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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MARGARET A. SELTZER, Cross-complainant and Appellant, v. WILLIAM GWIRE, Cross-defendant and Respondent.	A119049 (San Francisco City & County Super. Ct. No. CGC-02-416192)

Appellant Margaret Seltzer, an attorney, filed a cross-complaint against respondent William Gwire, also an attorney, in an interpleader action. Gwire made a successful special motion to strike one of the causes of action in the cross-complaint under the anti-SLAPP statute, Code of Civil Procedure section 425.16.[1] He was thereafter awarded attorney fees and costs, which are available as a matter of right to a prevailing defendant. Seltzer contends the award was improper for various reasons, including that Gwire was not entitled to recover fees for the work of his attorney because she is employed in his law practice. We affirm.

I. BACKGROUND

Tandberg, Inc. (Tandberg) filed this action in interpleader, joining as parties Seltzer, Steven Krantz, and their respective sole proprietorships. The complaint in

[1] "SLAPP," the common abbreviation for the statute, stands for "strategic lawsuit against public participation." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1.)

interpleader alleged that Krantz had filed a lawsuit against Tandberg (Tandberg action) in which he was represented by Seltzer. Seltzer eventually withdrew from that representation and filed a notice of attorney's lien in the Tandberg action. When Tandberg and Krantz settled, Tandberg filed this action and interpleaded a portion of the settlement adjudged sufficient to satisfy Seltzer's lien.

Seltzer filed a cross-complaint against, among others, the attorney who replaced her as Krantz's counsel in the Tandberg action, Gwire. The cross-complaint alleged two causes of action against Gwire, one of which was a claim for intentional interference with contract premised on Gwire's conduct while acting as counsel for Krantz in connection with the Tandberg action. In response to Gwire's filing of a special motion to strike the intentional interference cause of action under the anti-SLAPP statute, Seltzer's cross-complaint was dismissed with leave to amend. Her amended cross-complaint alleged four causes of action against Gwire, including a claim for intentional interference with contract similar to that in the original cross-complaint. Gwire renewed his special motion to strike, but it was denied.

On an interlocutory appeal, this court reversed the trial court's denial of the special motion and ordered dismissal of the intentional interference cause of action. (*Seltzer v. Gwire* (Oct. 24, 2005, A107526) [nonpub. opn.] (*Seltzer I*).) In concluding the decision, we stated, "The order denying Gwire's motion to strike the fifth cause of action of Seltzer's cross-complaint is reversed and the trial court is directed to enter a new and different order striking the fifth cause of action of Seltzer's cross-complaint." Following remand, in January 2006, the trial court entered an order dismissing the intentional interference claim. Entry of the order appears to have been sua sponte; there is no indication on the court's docket sheet that either party requested it. In June, five months after this order was entered, Seltzer filed a motion to vacate it.

In the meantime, in February, Gwire filed a motion for attorney fees incurred in connection with the special motions to strike, which a prevailing defendant is entitled to recover under the anti-SLAPP statute. (Code Civ. Proc., § 425.16, subd. (c).) Gwire was represented on this motion, as he had been throughout the special motion proceedings, by

attorney Tia Pollastrini, who worked in his law practice. The motion for attorney fees was supported by Pollastrini's time records and other expense documentation. These demonstrated that Pollastrini performed the legal work connected with the two special motions to strike filed in the trial court and wrote the opening appellate brief. Because of a busy schedule, however, she had retained another entity, called "Quo Jure," to prepare the appellate reply brief. Gwire did no work on the motions or appeal. He stated in a declaration that he retained Pollastrini to represent him in connection with Seltzer's cross-claim because she was a capable attorney, was familiar with the Tandberg action, and was conveniently located, since they worked from the same office.

In opposition, Seltzer argued that Gwire could not recover for Pollastrini's time because she "holds herself out to be Mr. Gwire's [law] partner," a contention that led to discovery about Pollastrini's relationship to Gwire's law firm, Gwire Law Offices. Contrary to Seltzer's claim, Gwire Law Offices is a sole proprietorship, not a partnership. Although Pollastrini had worked for Gwire Law Offices since 1991, she had never been made a partner in the firm. Pollastrini testified she was paid "on an hourly basis" for all her work for Gwire, although the work representing him personally was conducted under a "separate arrangement" from her work for his clients.[2] When representing Gwire, Pollastrini did not secure her own malpractice insurance and used his law office's billing software to keep track of her time. Her compensation for work representing Gwire was paid by the same check with which she was paid for her work as an employee of the law firm.

Three related motions, Gwire's motion for attorney fees and Seltzer's motions to strike Gwire's memorandum of costs and to vacate the trial court's order granting the special motion to strike, were heard on August 29, 2006, by Judge Diane Elan Wick.[3] Judge Wick denied both of Seltzer's motions. She granted Gwire's motion, holding he

[2] Pollastrini was vague about the terms of the purported special arrangement, and there is no indication it was reflected in a written agreement of any kind.

[3] Hearing on Gwire's motion, which was filed in February, was repeatedly adjourned and rescheduled, for reasons that are not clear from the appellate record.

was entitled to attorney fees, but she did not set a monetary award. Instead, in her tentative decision she directed Gwire to "submit a single document containing a defended [*sic*] billing statement clearly identifying work done in the first and second anti-SLAPP motions." As the court explained, "[W]hat we're interested in seeing is a single document separating the fees generated in each of the motions." The court did not explain its reasons for requesting the document, other than to note it would provide "clarity." Written orders reflecting these rulings were not entered until almost four months later, on December 18, 2006. Gwire filed a supplemental declaration in compliance with Judge Wick's order on February 28, 2007.

On March 16, Judge Patrick J. Mahoney entered an order directing Gwire to file the motion for attorney fees anew because of the substantial correspondence it had generated and confusion within the court regarding the proper department for disposition of the motion. Judge Mahoney heard the refiled motion on July 5, and issued a written order awarding fees one week later. Although he denied a request Seltzer had made for a statement of decision, noting that "it would simply provide a further opportunity for the parties' to reargue the very issues they have been arguing in the law and motion department since at leas[t] February of 2006," Judge Mahoney nonetheless explained the basis for his ruling. The order awarded Gwire fees for both the first and second anti-SLAPP motions, since "[t]he work done [on the first motion] necessarily formed the basis for the second motion." The court held that a reasonable billing rate for Pollastrini was $275 per hour, enumerated the various services performed by Pollastrini and the corresponding time spent, and awarded a total of $90,679, plus costs.

On the day Judge Mahoney's order issued, Seltzer filed a "Request to Vacate Tentative Ruling, Vacate Submission, and Request for Rehearing" regarding the attorney fees motion. Eleven days later, she filed a motion to vacate the attorney fees award. The court later denied these motions, noting in its tentative ruling, "there is no merit to any of defendant's contentions which were previously considered and rejected."

II. DISCUSSION

Seltzer contends (1) the trial court erred in denying her motion to vacate the order granting Gwire's special motion to dismiss, (2) Gwire should not have been found entitled to attorney fees for various reasons, (3) it was error for two different judges to decide Gwire's entitlement to fees and the amount of the fees, (4) the judges were required to issue statements of decision, (5) Judge Wick's order was in error because she did not decide the amount of fees, and (6) the award was not supported by substantial evidence.

A. *Seltzer's Motion to Vacate the Order Dismissing Her Claim*

In our decision reversing the trial court's order denying Gwire's special motion to dismiss, we directed the trial court "to enter a new and different order striking the fifth cause of action of Seltzer's cross-complaint." (*Seltzer I, supra*, A107526.) On remand, the trial court did as it was instructed. Seltzer argues that, for various reasons, the order entered was improper and should have been vacated.

We decline to address Seltzer's arguments on their merits. The decision to grant Gwire's special motion to strike was made by this court. Seltzer's various arguments that the trial court's order was in error on the merits are therefore precluded by the doctrine of law of the case. (See, e.g., *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491 [under the law of the case doctrine, " '[t]he decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial' "]; *People v. Anderson* (2008) 169 Cal.App.4th 321, 331–332.)

Her arguments that the order was flawed in form fail because they would not provide a basis for reversal of the attorney fees award. In order to obtain reversal of a judgment, it is not sufficient to point out error; rather, the appellant must demonstrate that the error was prejudicial. (Code Civ. Proc., § 475; *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 311.) Even if Seltzer is correct that the order dismissing her claim contains flaws, her remedy would merely be the entry of a corrected

order dismissing the cause of action, not the preservation of her dismissed claim. Under those circumstances, Gwire's entitlement to fees would be preserved.

B. ***Gwire's Entitlement to Fees***

Seltzer argues that Judge Wick erred in awarding fees to Gwire because (1) his attorney, Tia Pollastrini, was an employee of his law firm, Gwire Law Offices; (2) "[n]o 'cause of action' was eliminated as required by the anti-SLAPP statute because the same facts were alleged under other legal theories"; (3) Gwire and Pollastrini had a conflict of interest, "rendering their work non-compensable"; (4) Gwire failed to provide admissible evidence that he incurred attorneys fees for the second motion to strike and the appeal, since most work was done in connection with the initial motion; and (5) Judge Wick's order did not provide a proper explanation of the basis for her ruling and was "interlocutory" because it did not determine the amount of fees.

1. ***Self-representation***

Seltzer's argument that Gwire cannot recover for Pollastrini's time because she is an employee of his law firm is based primarily on *Trope v. Katz* (1995) 11 Cal.4th 274 (*Trope*), in which the Supreme Court held that a law firm that is represented in litigation by its member attorneys cannot recover attorney fees under Civil Code section 1717, which enforces contractual attorney fees clauses.[4] (*Trope*, at p. 292.) The court reasoned that when the members of a law firm represent the firm in litigation, they are effectively representing themselves. Allowing the law firm to recover fees in litigation against a

[4] It is not entirely clear that *Trope* should be applied in the context of Code of Civil Procedure section 425.16. The *Trope* court, which was construing the language of Civil Code section 1717, expressly restricted its holding to contractual attorney fees, noting that fees awarded under a private attorney general statute are distinguishable. (*Trope, supra*, 11 Cal.4th at p. 284.) Nonetheless, because other courts have freely applied *Trope* in this context, we assume, without deciding, that it applies here. (See, e.g., *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 494 [holding, on the authority of *Trope*, that a pro. per. attorney cannot recover attorney fees under Code Civ. Proc., § 425.16]; see also *Musaelian v. Adams* (2009) 45 Cal.4th 512, 520 [attorney representing himself in litigation cannot recover attorney fees as a sanction under Code Civ. Proc., § 128.7].)

party with retained counsel, the court held, would undercut the purpose of Civil Code section 1717 to "establish mutuality of remedy" in contractual attorney fees provisions. (*Trope,* at pp. 285–286.) In addition, the court reasoned, a self-represented attorney does not "incur" legal fees, as required by section 1717, because he or she does not pay or become liable to pay consideration in exchange for the representation. (*Trope,* at p. 292.)

The other Supreme Court decision framing this question is *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084 (*PLCM Group*), in which the court, again applying Civil Code section 1717, held that an insurance company represented in litigation by its in-house counsel can recover contractual attorney fees. Distinguishing this situation from *Trope,* the court held that there was no violation of the objective of equalizing mutuality of remedy because the in-house lawyer did not represent his or her own interests in the litigation. (*PLCM Group,* at p. 1093.) Rather, the employee lawyer was an "independent third party" whose salary was the equivalent of a retainer for outside counsel. (*Ibid.*) Accordingly, the court found no reason to distinguish in-house counsel from private outside counsel. (*Id.* at p. 1094.)

Before addressing the application of these cases, we must clear up one area of confusion. The parties dispute whether Gwire was sued in his individual capacity or whether his law firm was sued. In fact, there is no distinction. "Gwire Law Offices" is merely a fictitious business name Gwire adopted for purposes of his law practice. The use of a fictitious business name does not create a separate entity. (*Pinkerton's, Inc. v. Superior Court* (1996) 49 Cal.App.4th 1342, 1348.) Rather, "the designation 'd.b.a.' in connection with an individual indicates that the individual operates a business and is liable for its obligations." (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 802, fn. 6.) Whether Seltzer sued "William Gwire," or "Gwire Law Offices," or both, she could only have sued Gwire in his individual capacity, since there was no separate legal entity "Gwire Law Offices."

With that clarification, it becomes clear *Trope* is inapplicable here. Gwire's representation by his employee did not constitute the type of self-representation found in *Trope*. Rather, his situation is indistinguishable from that of the defendant in *Gilbert v.*

Master Washer & Stamping Co. (2001) 87 Cal.App.4th 212, in which an attorney sued in his personal capacity was represented by other members of his law firm. The court held the defendant attorney could recover attorney fees under Civil Code section 1717 because he incurred fees and was able to have an attorney-client relationship with the attorneys representing him. (87 Cal.App.4th at pp. 221–222.) So here, Gwire incurred (and actually paid) legal fees to Pollastrini and maintained an attorney-client relationship with her. He was therefore entitled to recover attorney fees for her services. (See also *Mix v. Tumanjan Development Corp.* (2002) 102 Cal.App.4th 1318, 1324–1325 [attorney who represented himself in litigation can recover attorney fees under Civ. Code, § 1717 for supporting legal work done by retained counsel who were not counsel of record].)

The fact that Gwire referred to Pollastrini as a "member" of his "law firm" is without legal significance. In context, this merely indicated that Gwire employed Pollastrini to provide assistance in his representation of clients. In no sense did it cause Gwire to be self-represented when he was represented by Pollastrini, since she had no economic or other interest in the outcome of the litigation.[5] (*PLCM Group, supra*, 22 Cal.4th at p. 1093.)

The other factors argued by Seltzer are irrelevant. It does not matter that Pollastrini did not maintain her own office or business software and relied on Gwire's malpractice insurance while representing him, or that they had no separate retention agreement. It is not the law, for the reasons discussed above, that an attorney cannot recover attorney fees if represented in litigation by his or her employee. Nor is a written

[5] *Trope* and the other decision on which Seltzer relies, *Witte v. Kaufman* (2006) 141 Cal.App.4th 1201, were casual in their use of the terms "members" and "law firm." Although neither *Trope* nor *Witte* was explicit about the relationship between the lawyers and the law firm entity, in both it appears the courts equated "members of the law firm" with "partners in the legal partnership." Indeed, their reasoning that the "members" of a "law firm" are effectively representing themselves when representing the firm makes sense only if the lawyers have a financial interest in the legal entity that is the "law firm." Attorneys employed by the law firm who have no financial interest in the outcome of the litigation, such as Pollastrini, are analogous to the in-house attorney in *PLCM Group*, who was representing his employing corporation.

fee agreement required for the establishment of an attorney-client relationship. While some agreement is required, it need not be express but can be implied from the conduct of the parties. (E.g., *Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 729–730.) The conduct of Gwire and Pollastrini plainly manifested their agreement that Pollastrini represent Gwire in the interpleader litigation.

2. *Gwire's Status as Prevailing Party*

Seltzer next argues that Gwire cannot be considered a "prevailing defendant" for purposes of Code of Civil Procedure section 425.16, subdivision (c) because his special motion did not result in the striking of a cause of action, but merely of a theory of recovery.

The law governing this question was recently summarized in *Lin v. City of Pleasanton* (2009) 175 Cal.App.4th 1143. "The anti-SLAPP statute reflects the Legislature's 'strong preference for awarding attorney fees to successful defendants.' [Citation.] The term 'prevailing party' must be 'interpreted broadly to favor an award of attorney fees to a partially successful defendant.' [Citation.] However, a fee award is not required when the motion, though partially successful, was of no practical effect. (*Moran v. Endres* (2006) 135 Cal.App.4th 952, 955–956 [the trial court did not abuse its discretion when it denied the defendant's fees for an anti-SLAPP motion that challenged numerous tort claims brought by the plaintiff but succeeded in striking only a single cause of action for conspiracy].) '[A] party who partially prevails on an anti-SLAPP motion must generally be considered a prevailing party unless the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the motion.' " (*Id.* at p. 1159.)

This issue normally arises when a defendant seeks dismissal of a large number of causes of action and fails as to some of them. (E.g., *Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 340 (*Mann*); *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1017.) Even in that situation, the only decision we have found that denied fees altogether is *Moran v. Endres*, in which the defendant sought dismissal of the entire complaint but was successful only as to a claim for conspiracy, which, the court

noted, was not an independent cause of action. As a result, the court concluded, the ruling on the special motion to strike "in every practical sense meant nothing." (*Moran v. Endres, supra*, 135 Cal.App.4th 952, 956.) In other decisions, the defendant's fees recovery has been reduced proportionately but not denied entirely when the motion is only partially successful. (E.g., *Mann*, at p. 340; *ComputerXpress, Inc. v. Jackson*, at p. 1017.) We review the trial court's decision on this issue for abuse of discretion. (*Mann*, at p. 340.)

We find no abuse of discretion here. Gwire's special motion to strike was narrowly targeted at the intentional interference with contract cause of action, and it was entirely successful. Not only is intentional interference with contract an independent cause of action, unlike the dismissed theory in *Moran v. Endres*, but it was also the most substantial cause of action pleaded against Gwire in the cross-complaint. The other three causes of action were perfunctory, alleging few facts separate from the facts alleged against Krantz and seeking to hold Gwire liable for Krantz's legal fees on the theory that Gwire had somehow received the money that should have gone to Seltzer. In contrast, the intentional interference cause of action pleaded three pages of detailed allegations found in no other cause of action, accusing Gwire of malfeasance and alleging conduct as far back as 1999. Eliminating that cause of action was not a result " 'so insignificant that [Gwire] did not achieve any practical benefit from bringing the motion.' " (*Lin v. City of Pleasanton, supra*, 175 Cal.App.4th at p. 1159.)

If any further proof of the practical value of this cause of action is necessary, it can be found in the tireless vigor with which Seltzer defended against the special motion. If, as she claims, the dismissal of this cause of action were without practical significance, it is difficult to explain the time and energy she expended to prevent it.

3. *The Conflicts of Interest*

Krantz was originally represented by Gwire's law firm in the interpleader litigation. In response to a motion filed by Seltzer, Gwire's law firm was disqualified from representing Krantz on grounds of conflict of interest. Seltzer argues this conflict of interest precludes Gwire from recovering attorney fees on the special motion to strike.

Seltzer cites no authority for this argument, and we find no merit in it. Even assuming, as Seltzer charges, some of Gwire's and Pollastrini's conduct was unethical, that conduct occurred in connection with the representation of Krantz. There was no evidence it affected Pollastrini's representation of Gwire.

4. *Work Done on the Second Motion*

Seltzer argues Gwire should only be entitled to recover attorney fees for the second special motion to strike because that was the "successful" motion.

Contrary to Seltzer's claim, both motions were successful. Each resulted in the dismissal of the claim it challenged.[6] In any event, as the trial court noted, the division of Pollastrini's work into the first and second motions is artificial. Because Gwire's legal theory did not change, Pollastrini was able to use much of her work on the first motion in making the second motion. Had there been no first motion, Pollastrini would have been required to perform substantial additional work in connection with the second motion. We find no abuse of discretion in the awarding of fees for both.

Seltzer cites *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, which held that an anti-SLAPP prevailing defendant "is only entitled to recover costs and fees for the motion to strike, not the entire suit." (*Id.* at p. 1382.) Because Gwire sought only compensation for the fees incurred for the two special motions to strike, not the entire interpleader action, *Lafayette Morehouse* does not require a reduction in his recovery.

[6] There is substantial question whether the trial court's dismissal of Seltzer's cross-complaint with leave to amend was an appropriate response to a cause of action pleading mixed facts, i.e., both matters covered and not covered by the anti-SLAPP statute. (See *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287–1288 ["[a] mixed cause of action is subject to [Code Civ. Proc. §] 425.16 if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity"].) Gwire should not be penalized for the trial court's decision to give Seltzer an arguably undeserved second chance.

5. *The Propriety of Judge Wick's Order*

Seltzer argues that Judge Wick's order was erroneous because it was "[a]t the most, . . . interlocutory" and was not adequately explained.

While we agree Judge Wick's order was interlocutory, that is not a basis for finding it erroneous. The interlocutory nature of the order merely precluded appeal of the issue of attorney fees until a finding had been made as to the amount of attorney fees due. (*P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1053.) Seltzer cites no authority precluding the issuance of an order awarding attorney fees that leaves the amount of fees to be awarded for later determination.

Nor was Judge Wick required to provide a fuller explanation for the basis of her ruling. The authority cited by Seltzer, *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859 (*Rosenman*), requires a written statement only in connection with a fee award in favor of a prevailing defendant in an employment discrimination lawsuit under the California Fair Housing and Employment Act (Gov. Code, § 12900 et seq.). (*Rosenman,* at p. 867.) As the *Rosenman* court made clear, that requirement was imposed only to ensure that the trial court properly applied the statutory provision limiting the award of fees to lawsuits that are frivolous, unreasonable, or without foundation. (*Id.* at pp. 865, 868.) Because attorney fees are available to a prevailing defendant on a special motion to strike as a matter of statutory right, there is no need for similar findings here, and many cases have held that a statement of decision or similar explanatory order is not required for an award of attorney fees to a prevailing defendant under Code of Civil Procedure section 425.16. (E.g., *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1323.)

C. *Judge Mahoney's Award of Fees*

Seltzer contends that Judge Mahoney's order awarding fees must be reversed because (1) Judge Mahoney refused to reconsider Judge Wick's order declaring Gwire was entitled to recover attorney fees under Code of Civil Procedure section 425.16,

subdivision (c); (2) it was improper for Judge Mahoney to decide the amount of fees due because he did not decide the special motion; (3) Judge Mahoney should have issued a statement of decision; and (4) the evidence provided by Gwire on the motion was insufficient to support the award of fees.

1. *Refusal to Reconsider*

Seltzer's argument that Judge Mahoney should have reconsidered Judge Wick's order granting attorney fees is based entirely on the arguments addressed above for the reversal of Judge Wick's order. Because we have found these arguments to be without merit, Judge Mahoney's denial of reconsideration could not have constituted prejudicial error. (Code Civ. Proc., § 475; *Western Aggregates, Inc. v. County of Yuba*, *supra*, 101 Cal.App.4th 278, 311.)

2. *Entitlement to the Same Judge*

Seltzer contends that Judge Mahoney's order must be reversed because the same judge who adjudicates a party's right to attorney fees must also render a decision as to the amount of fees owing.

Seltzer cites only one case that actually requires the same judge to hear a subsequent motion for attorney fees. The remainder of the cases on which she relies merely note that, when fees are awarded in connection with proceedings in the trial court, the judge who presided over the proceedings is in the best position to determine entitlement to attorney fees. (E.g., *Serrano v. Priest* (1977) 20 Cal.3d 25, 49; *Olson v. Cohen* (2003) 106 Cal.App.4th 1209, 1217; see similarly *Behniwal v. Mix* (2007) 147 Cal.App.4th 621, 634.) To note the same judge is in the best position to decide the motion and to *require* that judge to decide the motion are very different matters. There is nothing in those cases suggesting that a valid award can only be made by the judge who presided over trial of the merits. On the contrary, two reported anti-SLAPP cases have noted that different judges determined the merits of a special motion and awarded attorneys fees without suggesting any error. (*Mann*, *supra*, 139 Cal.App.4th at p. 337, fn. 3; *Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1085, fn. 5.)

The sole case actually requiring the same judge is *Gamble v. Los Angeles Dept. of Water & Power* (2002) 97 Cal.App.4th 253. *Gamble* is based entirely on the unique language of the attorney fees statute there under consideration, rather than on a more general requirement that attorney fees motions must be heard by the same judge who presides over the matter for which fees are sought. *Gamble* interpreted Code of Civil Procedure section 1038, which "allows public entities to recover the costs (including attorneys' fees) of defending against unmeritorious and frivolous lawsuits." (*Gamble*, at p. 255.) Section 1038, which applies solely to the California Torts Claims Act, permits a public entity to recover costs after prevailing in such a lawsuit if the lawsuit was not brought with reasonable cause and good faith. (Code Civ. Proc., § 1038, subd. (a).) The statute expressly limits an award of fees to cases in which "the defendant or cross-defendant has made a motion for summary judgment, judgment under Section 631.8, directed verdict, or nonsuit and the motion is granted" (*id.*, subd. (d)), and the motion for attorney fees must be made "on notice contained in a party's papers" (*id.*, subd. (b)) and granted "at the time of the granting of any summary judgment, motion for directed verdict, motion for judgment under Section 631.8, or any nonsuit" (*id.*, subd. (a)). To give effect to these provisions, which bind the motion for attorney fees closely to the dispositive motion, the court in *Gamble* held that the fees motion must be heard by the same judge who hears the dispositive motion, unless that judge is unavailable. (97 Cal.App.4th at p. 259.) There is no indication that *Gamble* intended its ruling to apply outside section 1038; on the contrary, its ruling was clearly dictated by the unique language of that particular statute. There is no reason to imply the same requirement into a statute that contains no similar language.

Seltzer's argument would be particularly difficult to implement in these circumstances. At least five judges or justices presided over proceedings for which Gwire sought attorney fees: in addition to Judge Wick, there were three appellate justices from this court and the judge who heard the two special motions in the trial court. It would be impractical to require each of those to render a decision as to the value of the work performed on Gwire's behalf in front of them. Further, the benefits of having the

same judge are attenuated in these particular circumstances. There was nothing discretionary about the decision to award fees. Because he was a prevailing defendant, Gwire was entitled to attorney fees as a matter of right under Code of Civil Procedure section 425.16, subdivision (c). In addition, the trial court was not required to apportion Gwire's fees because he was granted all of the relief he sought. Accordingly, a trial judge with no familiarity with the underlying proceedings was able to make a fair and informed determination of reasonable attorney fees based on the documentation Gwire submitted.

3. *Statement of Decision*

As discussed above, it is well established that a judge granting a motion for attorney fees under Code of Civil Procedure section 425.16, subdivision (c) is not required to issue a statement of decision, even if such a statement is requested. (E.g., *Christian Research Institute v. Alnor, supra,* 165 Cal.App.4th at p. 1323.) The authority cited by Seltzer, *Rosenman, supra*, 91 Cal.App.4th 859, construes a different statute that grants attorney fees only in narrow circumstances. (*Id.* at pp. 865, 868.) It has no application to a motion for fees under section 425.16.

4. *Evidence Supporting the Award*

Seltzer makes a variety of evidentiary claims with respect to the validity of Judge Mahoney's order, none of which survive scrutiny.

"[*A*]*ll the fees claimed"*: Seltzer claims that Judge Mahoney erroneously held Gwire was entitled to all the fees he claimed. In fact, a review of the court's order demonstrates that Judge Mahoney reduced the requested amount substantially, applying a lower hourly rate than requested and disallowing certain requested items.

Reliance on a submission found inadequate by Judge Wick: Seltzer argues that Judge Mahoney based his decision on an evidentiary submission Judge Wick had found to be inadequate. Judge Wick's ruling and her comments at the hearing indicated that she did not request further materials because she found Gwire's evidence to be insufficient but because she found it unclear. She made no ruling as to the adequacy of Gwire's evidentiary submissions.

No admissible evidence: Seltzer argues the evidentiary submissions by Gwire and Pollastrini consisted solely of argument and lacked admissible evidence of time spent working on the special motion. We have reviewed these submissions, which consisted largely of typical attorney time records, and find them to contain substantial competent and admissible evidence sufficient to support Judge Mahoney's award. (See *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375–1376 [award of attorney fees in anti-SLAPP action can be based on attorney declarations].)

III. DISPOSITION

The judgment of the trial court is affirmed.

_____
Margulies, J.

We concur:

_____
Marchiano, P.J.

_____
Graham, J.*

* Retired judge of the Marin County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.